(12)

MAR 24 2004

No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A/ KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

RICHARD K. HINES, V
TAYLOR TAPLEY DALY
NELSON MULLINS RILEY & SCARBOROUGH LLP
First Union Plaza, Suite 1400
999 Peachtree Street, NE
Atlanta, GA 30309
(404) 817-6000

R. BRUCE RIDER
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 629-2877

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
AMANDA L. TYLER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

HYMAN HILLENBRAND
DEORCHIS, HILLENBRAND & WIENER, LLP
2650 Biscayne Boulevard
Miami FL, 33137
(305) 571-9200

Counsel for Petitioner

* Counsel of Record

March 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

f/o

QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers that actually transport the owner's goods.

2. Whether the phrase "person (including any independent contractor) whose services have been used in order to perform the contract" in a freight forwarder's multimodal bill of lading covers a rail carrier that actually transports the goods to their inland destination, regardless of whether the rail carrier is in privity with the freight forwarder.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
RELEVANT FEDERAL STATUTES	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	17
ARGUMENT	21
I. KIRBY IS BOUND BY THE TERMS OF THE HAMBURG SÜD BILL OF LADING	21
A. Decisions Of This Court Require Enforcement Of The Hamburg Süd Bill Of Lading Against Kirby	22
B. The Rule That The Owner Is Bound By The Freight Forwarder's Contracts With The Actual Carrier Applies Across All Modes of Transport	32
C. Adoption Of The Rule Below Would Undermine COGSA And Settled, Efficient Trade Practices	36
II. NORFOLK SOUTHERN'S LIABILITY IS LIMITED BY THE HIMALAYA CLAUSE IN THE ICC BILL OF LADING	40
CONCLUSION	50

TABLE OF AUTHORITIES

CASES

Page

The Carib Prince, 170 U.S. 655 (1898) 43, 45
Chicago, Milwaukee, St. Paul & Pac. R.R. v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949)...*passim*
Constable v. *National S.S. Co.*, 154 U.S. 51 (1894)..... 30, 42
Council of N. Atl. Shipping Ass'ns v. *FMC*, 672 F.2d 171 (D.C. Cir. 1982)..... 6
Crossman v. *Burrill*, 179 U.S. 100 (1900)..... 44
District of Columbia v. *Johnson*, 165 U.S. 330 (1897)..... 43
Great N. Ry. v. *O'Connor*, 232 U.S. 508 (1914)...*passim*
Green v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823)..... 42
Hall Corp. of Can. v. *Cargo Ex Steamer Mont Louis*, 62 F.2d 603 (2d Cir. 1933)..... 35
Hart v. *Pennsylvania R.R.*, 112 U.S. 331 (1884) 38
Insurance Co. of N. Am. v. *S/S Am. Argosy*, 732 F.2d 299 (2d Cir. 1984) 34
ICC v. *Delaware, Lackawana & W. R.R.*, 220 U.S. 235 (1911)..... 27
Kansas City S. Ry. v. *Carl*, 227 U.S. 639 (1913) 35
Krender v. *Woolcott*, 1 Hilt. (N.Y.) 223 (1856)..... 26
Kukje Hwajae Ins. Co. v. *M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3400 (Nov. 22, 2002) (No. 02-813)..... 19, 34, 38
Lehigh Valley R.R. v. *United States*, 243 U.S. 444 (1917)..... 27
Marks v. *United States*, 430 U.S. 188 (1977)..... 24
Mexican Light & Power Co. v. *Texas Mexican Ry.*, 331 U.S. 731 (1947) 5, 47
Michigan Cent. R.R. v. *Mark Owen & Co.*, 256 U.S. 427 (1921)..... 30
Mitsui & Co. v. *American Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981) 42

TABLE OF AUTHORITIES – continued

Page

NLRB v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980)..... 2, 33
New Jersey Steam Navigation Co. v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848)..... 18, 22, 23, 24
New York Foreign Freight Forwarders & Brokers Ass'n v. *ICC*, 589 F.2d 696 (D.C. Cir. 1979) 33
Nichimen Co. v. *M.V. Farland*, 462 F.2d 319 (2d Cir. 1972)..... 38
Nippon Fire & Marine Ins. Co. v. *Skyway Freight Sys., Inc.*, 235 F.3d 53 (2d Cir. 2000)..... 31, 32, 40
O'Connor v. *Great N. Ry.*, 136 N.W. 743 (Minn. 1912), *rev'd, Great N. Ry.* v. *O'Connor*, 232 U.S. 508 (1914)..... 28
Pittsburgh, Cincinnati, Chi. & St. Louis Ry. v. *Fink*, 250 U.S. 577 (1919) 35
Puerto Rico Mar. Shipping Auth. v. *Crowley Towing & Transp. Co.*, 747 F.2d 803 (1st Cir. 1984) 32
Queen of the Pacific, 180 U.S. 49 (1901) 31
Railroad Co. v. *Androscoggin Mills*, 89 U.S. (22 Wall.) 594 (1874)..... 30, 44, 45
Reid v. *Fargo*, 241 U.S. 544 (1916)..... 25
Robert C. Herd & Co. v. *Krawill Mach. Corp.*, 359 U.S. 297 (1959).....*passim*
SPM Corp. v. *M/V Ming Moon*, 965 F.2d 1297 (3d Cir. 1992)..... 9
SPM Corp. v. *M/V Ming Moon*, 22 F.3d 523 (3d Cir. 1994)..... 34
The St. Hubert, 107 F. 727 (3d Cir. 1901)..... 31, 40
Singer v. *United States*, 323 U.S. 338 (1945) 43
Secrest Mach. Corp. v. *S.S. Tiber*, 450 F.2d 285 (5th Cir. 1971)..... 9
Standard Electrica, S.A. v. *Hamburg Sudamerikanische Dampfschifffahrts-Gelsellschaft*, 375 F.2d 943 (2d Cir. 1967) 9

TABLE OF AUTHORITIES – continued

Page

Stolt Tank Containers, Inc. v. *Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992) 35, 36
Teall v. *Sears & Griffith*, 9 Barb. 317 (N.Y. Gen. Term 1850) 26
Tessler Bros. (B.C.) Ltd. v. *Italpacific Line*, 494 F.2d 438 (9th Cir. 1974) 8
Texas & Pac. Ry. v. *Reiss*, 183 U.S. 621 (1902)... 21, 42
United States v. *American Union Transp.*, 327 U.S. 437 (1946)..... 6
United States v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940)..... 26, 27
United States v. *Gonzales*, 520 U.S. 1 (1997)..... 43
Vimar Seguros y Reaseguros, S.A. v. *M/V Sky Reefer*, 515 U.S. 528 (1995) 8, 37
Wemhoener Pressen v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734 (4th Cir. 1993) 7, 39, 43
Western Transit Co. v. *A.C. Leslie & Co.*, 242 U.S. 448 (1917)..... 42
York Co. v. *Central R.R.*, 70 U.S. (3 Wall.) 107 (1865)..... 24, 25

STATUTES

The Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936)..... 1
Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (codified at 46 U.S.C. app. § 1707(a))..... 4
46 U.S.C. app. § 1300 8
app. §§ 1300-1315 1
app. § 1301 9
app. §§ 1302-1304 8
app. § 1304(5)..... 8, 9
app. § 1307 9

TABLE OF AUTHORITIES – continued

Page

46 U.S.C. app. § 1701(1) & (2)..... 3
app. § 1702(17)..... 7, 19, 34
app. § 1707(a) 4, 34
app. § 1709(b)..... 34
49 U.S.C. § 1002(a)(5) (1958) (repealed 1978) 33
Practices of Licensed Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers, 28 Fed Reg. 4300 (May 1, 1963) 33
Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States, 35 Fed Reg. 6394 (Apr. 21, 1970) 33
Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States, 50 Fed. Reg. 14,704 (Apr. 15, 1985)..... 34, 35
50 Fed. Reg. 38,896 (Sept. 25, 1985)..... 34

LEGISLATIVE HISTORY

S. Rep. No. 74-742 (1935) 8
H.R. Rep. No. 74-2218 (1936) 8
H.R. Rep. No. 98-53, pt. 1 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167 4

RULE

Sup. Ct. R. 15.2 48

ADMINISTRATIVE DECISIONS

Ariel Mar. Group, No. 84-38, 1985 W.L. 148948 (FMC Dec. 16, 1985)..... 6, 34
Common Carriers by Water – Status of Express Cos., Truck Lines & Other Non-Vessel Carriers, 6 F.M.B. 245 (1961) 33

TABLE OF AUTHORITIES – continued

FOREIGN CASES

New Zealand Shipping Co. v. A.M. Satterthwaite & Co., 1 Lloyd's Rep. 534 (P.C. 1974) 47
Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446 (1961) 47

SCHOLARLY AUTHORITIES

14 Am. Jur. 2d *Carriers* § 558 (2000) 36
T. Carver, *A Treatise On the Law Relating to the Carriage of Goods By Sea* (7th ed. 1925) 31
M. Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337 (2000) 38
A. Dobie, *Handbook on the Law of Bailments and Carriers* (1914) 30, 31, 35
G. Gilmore & C. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 5, 7, 8, 37
J. Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* (1993) 13, 14, 44, 47
D. Robertson et al., *Admiralty And Maritime Law In the United States* (2001) 8, 47
1 T. Schoenbaum, *Admiralty and Maritime Law* (4th ed. 2004) 5, 6
M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part I)*, 19 J. Mar. L. & Com. 1 (1988) 40
M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157 (1988) 9, 38, 39
M. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251 (1989) 38

TABLE OF AUTHORITIES – continued

M. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. Mar. L.J. 1 (2001) 46
M. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex. Int'l L. J. 65 (2003) 4, 46
G. Ullman, *The Ocean Freight Forwarder, The Exporter And The Law* (1967) 6

OTHER AUTHORITIES

P. Bugden, *Freight Forwarding and Goods in Transit* (1999) 6, 7, 31, 36
R. De Wit, *Multimodal Transport* (1995) 8
R. Holtom, *Underwriting Principles and Practices* (3d ed. 1987) 10
P. Jones, *FIATA Legal Handbook on Forwarding* (3d ed. 2001) 8, 12, 40, 44
J. Mahoney, *Intermodal Freight Transportation* (1985) 2, 3, 5
Maritime Admin., Dep't of Transp., *Report to Congress: An Assessment of the U.S. Marine Transportation System* (1999) 2, 3, 48
1 S. Sorkin, *Goods In Transit* (2003) ..... *passim*
3 S. Sorkin, *Goods In Transit* (2003) 32, 33
4 S. Sorkin, *Goods In Transit* (2003) 35

OPINION BELOW

In an unpublished order, the district court granted partial summary judgment on behalf of Norfolk Southern. Pet. App. 27a-38a. The district court then issued an order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b). Pet. App. 21a-26a. The opinion of the court of appeals reversing the district court is published at 300 F.3d 1300 (11th Cir. 2002), and is reproduced at Pet. App. 1a-20a.

JURISDICTION

The court of appeals entered judgment on August 8, 2002, and denied rehearing on October 7, 2002. Pet. App. 39a-40a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES

The Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), is codified at 46 U.S.C. app. §§ 1300-1315 and is reproduced at Pet. App. 41a-53a.

STATEMENT OF THE CASE

The court of appeals below issued two rulings that run afoul of this Court's precedent and undermine established and efficient practices in the international transportation of goods. First, the Eleventh Circuit held that an ocean carrier's bill of lading is unenforceable against the cargo owner because the bill was issued to a freight forwarder that itself had liability to the cargo owner as a carrier. This holding is contrary to 150 years of decisions of this Court squarely on point, and of every other court to address the issue, as well as the very structure of federal statutes governing maritime commerce. Second, the Eleventh Circuit improperly invoked this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), to disregard the plain language of

the bill of lading and to reform the contract in ways that have no foundation in the intent of the parties or the realities of modern multimodal transportation practices. This Court should reverse the decision below and restore the rules of law on which international transportation providers have long relied.

1. Multimodal Transportation of Goods. Beginning in the late 1950's, ocean carriers increasingly began to carry cargo in large, standard-sized containers that could be unloaded from a ship without being opened and then readily transferred to a rail flatcar or truck chassis, "a technological innovation which has had such a profound effect on [the shipping] industry that it has frequently been termed 'the container revolution.'" *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490, 494 (1980) ("*ILA*") ("'containerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner'"); J. Mahoney, *Intermodal Freight Transportation* 13-23 (1985). By reducing costs and delays in the handling of goods and losses from damage or theft, containerization dramatically improved the efficiency of international ocean shipping. See 1 S. Sorkin, *Goods In Transit* § 1.13 (2003); *ILA*, 447 U.S. at 494-96. Ninety-five percent of U.S. trade moves by ship, and by far the dominant share of U.S. waterborne overseas trade in dollar terms is transported by container vessels.[1]

The use of containers has sparked a vast increase in international multimodal (also called intermodal) transportation, which is "'the successive carriage of a loaded container or trailer from an origin point to a destination point

[1] *See* Maritime Admin., Dep't of Transp., *Report to Congress: An Assessment of the U.S. Marine Transportation System* 2, 13-14 (1999) ("*Report to Congress*") ("Container ships carry 66 percent of the value of U.S. waterborne overseas trade and represent 11 percent of the annual tonnage"); *cf.* U.S. Br. In Support of Pet. for Cert. at 10 (28% of international waterborne cargo in this country was containerized in 2002).

by more than one mode of transportation in interstate or foreign commerce.'" 1 Sorkin, *supra* § 3.01, at 3-5 (quoting 49 U.S.C. § 501(a)(8)). Because containerization makes it easy to move cargo from one mode of transport to another, see *id.* § 1.13, at 1-86, transportation providers can offer shippers the convenience of entering into a single transaction for delivery of goods to inland destinations overseas. As the Federal Maritime Administration has observed:

> freight transportation is no longer viewed as a series of separate negotiations and arrangements with different types of freight providers such as trucking firms, railroads, and steamships. Instead, freight transportation is viewed and purchased in terms of the total trip from origin to destination, regardless of the number and type of transportation methods involved. Therefore, the U.S. marine transportation system extends beyond the waterfront, using trucks, railroads, and pipelines to receive and ship products.

Report to Congress at 29; see 1 Sorkin, *supra* § 3.01, at 3-6 ("Intermodal movements are becoming the most common form of ocean transportation service").

In the early decades of the container revolution, tight federal regulation of rates and conditions of carriage, with authority divided among different federal agencies, largely frustrated U.S.-regulated ocean carriers in offering "one-stop" shopping for overseas intermodal transportation services from origin to destination. See Mahoney, *supra*, at 17-18, 25-26. In the Shipping Act of 1984, Congress declared a national policy to minimize governmental regulation of foreign ocean commerce and to "provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices." 46 U.S.C. app. § 1701(1) & (2). Among other things, Congress authorized carriers to offer tariffed intermodal rates for transportation to and from the United States that would travel

on a single bill of lading. See *id.* app. § 1707(a)(1)(E) & (F) (requiring common carriers to set tariffs that establish rates "on any through transportation route" without any mandatory "inland divisions of a through rate," and include "any loyalty contract," "bill of lading, contract of affreightment, or other document evidencing the transportation agreement"). As the House Report stated:

> When a container moves between shipper and consignee under a single intermodal tariff, specific economies can be realized. A shipper saves time and concern associated with arranging the transfer of his cargo from one mode to another since he has to deal with only a single carrier rather than a number of carriers. For example, when a[n] ocean carrier offers an intermodal service, that carrier has the single responsibility for assuring the delivery of cargo from point to point, and only that carrier needs to be concerned with the arrangements for transferring the cargo between modes. Furthermore, this process involves a single bill-of-lading rather than multiple bills of lading.

H.R. Rep. No. 98-53, pt. 1, at 12-13 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 177-78.[2]

Intermodal ocean transport, as it has evolved, embodies a complex chain of contracts among various entities providing transportation services at points from origin abroad to inland destinations in the United States. See M. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex.

[2] Under the Ocean Shipping Reform Act of 1998, effective May 1, 1999, ocean carriers are no longer required to file their tariffs with the Federal Maritime Commission, but they are required to make their tariffs (including the applicable bill of lading or other document evidencing a transportation agreement) available for public inspection in an automated tariff system. *See* Pub. L. No. 105-258, § 106, 112 Stat. 1902, 1905 (codified at 46 U.S.C. app. § 1707(a)); 1 Sorkin, *supra* § 2.05[3][b].

Int'l L. J. 65, 79-80 (2003) ("*Interim View*"). Although there is infinite variation, in any given transaction an ocean carrier may contract with draymen to drop off and retrieve containers for loading with cargo; with surveyors to weigh and measure containers; with stevedores and crane operators to load and unload ships at each port; with warehousemen, watchmen, and security services; with other ocean carriers to perform all or part of the marine journey; with lift operators who load containers onto chassis and draymen who transport the container from the dock to an intermodal terminal; and with inland carriers (water, rail, or motor) to perform the inland phases of the transportation. See 1 Sorkin, *supra* §§ 1.12[3], 1.13, 1.13[2][d]; 3.01; Mahoney, *supra*, at 90-96; JA 63-64 (Hamburg Süd bill ¶ 5(b)).

An important consequence of these changes is that the water's edge has ceased to be "the critical point for the division of functions, costs, and risks." 1 T. Schoenbaum, *Admiralty and Maritime Law* § 10-4, at 590 (4th ed. 2004). The central instrument in intermodal ocean transportation is the ocean carrier's "through" bill of lading, which governs the entire transportation of the goods to final destination. See 1 Sorkin, *supra* § 3.03[2], at 3-27; *accord Mexican Light & Power Co.* v. *Texas Mexican Ry.*, 331 U.S. 731, 733-35 (1947) (holding that where a bill of lading covers transport to the final destination, it is a through bill and all connecting carriage is subject to its terms). The ocean carrier's bill of lading is "a highly important document" that "serves as a written embodiment of the terms of the contract of carriage, as a receipt for the goods, and as a negotiable document of title." G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 1-5, at 13 (2d ed. 1975). It is now "standard fare" for such bills to include "Himalaya clauses" that extend liability protections to identified persons providing services under the contract of transportation. Pet. App. 11a.[3] This "contractual extension of

[3] The "Himalaya clause" takes its name from an English case popularly known as *The Himalaya*. Pet. App. 2a.

the ocean carrier's [limitation-of-liability] rights to stevedores, terminal operators, and other cargo handlers is the result of the need for uniformity of the law in the age of multimodalism." 1 Schoenbaum, *supra* § 10-8, at 613-14.

The container revolution also changed the role of freight forwarders in ocean transportation. Prior to containerization, ocean freight forwarders typically acted strictly as agents of the shipper in procuring transportation. They did not undertake responsibility for the transportation of goods; instead, they owed fiduciary duties to the shipper, and therefore, were not permitted to profit at the shipper's expense. See *United States* v. *American Union Transp.*, 327 U.S. 437, 442-43 (1946); G. Ullman, *The Ocean Freight Forwarder, The Exporter And The Law* 5 (1967). With containerization, the opportunity emerged for freight forwarders to consolidate small shipments to fill a container, and therefore to take advantage of container rates that would be far lower than the rate the vessel carrier would have charged to transport each individual shipment; forwarders could also obtain volume discounts from the vessel carriers with whom they shipped. See *Council of N. Atl. Shipping Ass'ns* v. *FMC*, 672 F.2d 171, 174 (D.C. Cir. 1982). Increasingly, many freight forwarders began contractually to assume the duties of a carrier vis-à-vis its shippers so that they would be the shippers in regard to the actual vessel carrier, and therefore profit from the rate differentials. Such freight forwarders issue their own bills of lading to the cargo owner, assume liability for the safe transportation of the goods and place shipments in their own name with the actual carrier. See 1 Sorkin, *supra* § 1.15[8]; P. Bugden, *Freight Forwarding and Goods in Transit* § 3-12, at 59 (1999); *Ariel Mar. Group*, No. 84-38, 1985 W.L. 148948, at *1 (FMC Dec. 16, 1985). In this respect, these freight forwarders came to resemble surface freight forwarders, who had long assumed the duties of a carrier in their contracts with cargo owners in order to profit from consolidating shipments. See *Chicago,*

Milwaukee, St. Paul & Pac. R.R. v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 484 (1949). The freight forwarder's bill of lading, however, does not physically accompany the shipment; it does not define the terms under which the vessel carrier moves the goods; and downstream carriers and service providers generally have no reason to know that the freight forwarder bill of lading exists, much less rely upon its terms. The freight forwarder's bill of lading defines its duties to its customer, and therefore "[t]he attribution of carrier or other principal contractor status to the freight forwarder will normally be primarily of relevance to ascertaining liability to the customer for damage, loss or delay to the goods carried." Bugden, *supra* § 3-13, at 59.[4]

2. The Carriage Of Goods By Sea Act. Ocean carrier bills of lading for transportation of goods to and from the United States are governed by COGSA, and it is by force of COGSA that federal law provides the rule of decision in determining liability under carrier bills of lading. See Gilmore & Black, *supra* §§ 3-19 & -20, at 130-32; *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993). Prior to the mid-nineteenth century,

---

[4] Forwarders that assume carrier duties are referred to by "a variety of names, such as 'freight consolidator,' 'groupage operator' or 'N.V.O.C.C.'" R. De Wit, *Multimodal Transport* § 6.39, at 313 (1995); P. Jones, *FIATA Legal Handbook On Forwarding* 87 (3d ed. 2001) ("*FIATA Legal Handbook*") ("A forwarder acting as a principal to a contract of ocean carriage is now sometimes called a Non-Vessel Operating Common Carrier, or NVOCC"). Recognizing this, respondents urged the Eleventh Circuit to use the term "freight forwarder" because that was the term used by the freight forwarder here to describe itself, C.A. Aplts. Br. 6, and petitioner will abide by that convention since that is also the term used by this Court in surface transportation cases, *see infra* at 22-31. This Court should note, however, that the Shipping Act uses the term "non-vessel operating common carrier" to refer to this type of forwarder-carrier, while reserving the term "ocean freight forwarder" for the type of forwarder that simply procures transportation for a shipper as an agent but does not hold itself out as a carrier. *Compare* 46 U.S.C. app. § 1702(17)(A), *with id.* § 1702(17)(B).

parties to a contract of carriage for international transport enjoyed considerable freedom to allocate risk, subject to predominantly judge-made limitations. See D. Robertson et al., *Admiralty And Maritime Law In the United States* 317 (2001). In 1924, many of the world's maritime nations concluded the Hague Treaty "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers . . . in international trade." *Herd*, 359 U.S. at 301. COGSA, enacted thereafter in 1936, "is the culmination of [this] multilateral effort." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 537 (1995). Moreover, its provisions are largely modeled on the Hague Rules with the same purpose of establishing uniform and predictable rules governing risk-allocation that would be simple to apply in commerce. See, *e.g.*, S. Rep. No. 74-742, at 4 (1935); H.R. Rep. No. 74-2218, at 4-5 (1936); *accord Tessler Bros. (B.C.) Ltd.* v. *Italpacific Line*, 494 F.2d 438, 445 (9th Cir. 1974) ("One of the specific purposes of COGSA was to obviate the necessity for a shipper to make a detailed study of the fine print clauses of a carrier's regular bill of lading").

COGSA provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter." 46 U.S.C. app. § 1300. Sections 2 through 4 of COGSA, *id.* app. §§ 1302-1304, set forth the duties, rights, liabilities and immunities of the ship and the carrier as "compulsory terms" of the bill of lading. Gilmore & Black, *supra* § 3-38, at 172.

Of particular relevance here, section 4(5) of COGSA limits the liability of carriers by establishing a default rule that "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States." 46 U.S.C. app. § 1304(5). This rule applies "unless the nature and value of

such goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* Section 4(5) therefore protects shippers by setting a floor of $500 per package or unit below which carriers may not reduce their maximum potential liability, but "cast[s] upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wishe[s] to impose a higher liability upon the carrier." *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschifffahrts-Gelsellschaft*, 375 F.2d 943, 945 (2d Cir. 1967).

COGSA's liability limitations apply mandatorily only to a ship or "carrier," defined as "the owner or the charterer who enters into a contract of carriage with a shipper," and only for the period "when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. §§ 1301(a), (e). COGSA, however, permits shippers and carriers to make agreements governing responsibility and liability "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id.* app. § 1307. Shippers and carriers routinely extend COGSA's liability limits by including (1) a "Clause Paramount," which, as the statute authorizes, extends the liability rules beyond the "tackle to tackle" period, and (2) a Himalaya clause, which extends the liability limitations to persons other than the carrier. See *Herd*, 359 U.S. at 302-03; *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 (3d Cir. 1992); *Secrest Mach. Corp.* v. *S.S. Tiber*, 450 F.2d 285, 286-87 (5th Cir. 1971) (per curiam).

As had been anticipated in the drafting of the Hague rules adopted in COGSA, shippers routinely choose to accept COGSA's liability limitations rather than declare value, and "almost invariably" rely upon cargo insurance to cover any risk of loss. M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 174-75, 179-80 (1988) ("*Part II*"). Such insurance is not generally purchased for each shipment, but "is usually written

on an open basis, under which all shipments of the kind of merchandise described in the policy are covered." R. Holtom, *Underwriting Principles & Practices* 435 (3d ed. 1987).

3. The Contracts Of Carriage. In 1997, Respondent James N. Kirby, Pty Ltd. ("Kirby"), an Australian firm that manufactures machinery, engaged International Cargo Control Pty Ltd. ("ICC") to ship ten containers of machinery to the General Motors Corporation plant in Huntsville, Alabama. ICC, an Australian freight forwarder, is "a company that arranges for, coordinates, and facilitates cargo transport," but does not actually transport the goods in question. Pet. App. 3a.

Because it was not in the business of actually transporting goods, ICC contracted with Hamburg Südamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink ("Hamburg Süd"), an ocean carrier, for the actual transportation of the machinery from Sydney to Huntsville. Pet App. 3a-4a; JA 32 (Second Amended Complaint ¶ 9). On August 27, 1997, Hamburg Süd issued a standard-form bill of lading, under the banner of Columbus Lines and the Hamburg Süd Shipping Group, to ICC for ten containers (henceforth the "Hamburg Süd bill"). See, *e.g.*, JA 48-58. The bill identifies the "Carrier" as "Columbus Line, which is the trade name used by Hamburg Süd[]." JA 59 (¶ 1(a)). The bill was issued by Columbus Line Australia, Pty. Ltd. "as agent for the Carrier, Columbus Line," and the bill identifies ICC as the "shipper/exporter." JA 48. It further identifies the Queensland Star as the ocean vessel, Sydney as the port of loading, Savannah as the port of discharge, and Huntsville, Alabama as the place of delivery. See *id.* Accordingly, because the bill denominates Huntsville, some 300 miles inland from Savannah, as the ultimate destination for the goods, the bill constitutes a "through" bill of lading. JA 62 (¶ 4) (defining "through transportation" as when "either Place of Receipt or Place of Delivery . . . is an inland point").

The terms of the Hamburg Süd bill impose numerous obligations (including liability for payment and performance) upon the "Merchant," defined broadly to include "the shipper, consignee, receiver, holder of this Bill of Lading, *owner of the cargo* or person entitled to the possession of the cargo and the servants and agents of any of these." JA 59 (¶ 1(e)) (emphasis added). Hamburg Süd, in turn, commits to provide through transportation to the inland destination of Huntsville, which the bill recognizes "may well involve transport by rail," and authorizes Hamburg Süd to "sub-contract on any terms the whole or any part of the carriage" of the goods. JA 62, JA 63 (¶¶ 4, 5a).

The Hamburg Süd bill contains a Clause Paramount, strictly limiting Hamburg Süd's liability under the agreement to the COGSA $500 per package limitation, absent declaration by ICC of a greater value for the goods. JA 73 (¶ 17). ICC did not declare a value for the goods. JA 48. Finally, the Hamburg Süd bill included a Himalaya clause extending its liability limitations to any additional parties used to carry out the contract of carriage:

> [A]ll exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all Participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever . . . .

JA 63 (¶ 5(b)); see also JA 60 (¶ 1(g)) (definition of "participating carrier").

On the same day (August 27, 1997) that Hamburg Süd issued its bill to ICC, ICC issued its own bill of lading to Kirby (named as consignor), noting that the goods had already been "shipped on board" the Queensland Star. JA 78-84 ("ICC bill"). Like the Hamburg Süd bill, the ICC bill

identified Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the place of delivery. JA 78.

ICC utilized the standard form developed by the International Federation of Freight Forwarders Association ("FIATA"): the FIATA Multimodal Transport Bill of Lading, commonly referred to as the "FBL." Pet. App. 8a; see also attached Addendum (setting forth FBL "Standard Conditions"). Among freight forwarders, the FBL is "the world's most frequently used multimodal transport document." *FIATA Legal Handbook*, at 42. As the issuer of the bill, ICC is the "Freight Forwarder," which is defined as the "Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." JA 85 ("Definitions").

The contract specifically contemplates that ICC may engage other carriers to perform the contract, as it did:

> By issuance of this FBL the Freight Forwarder a) undertakes to perform *and/or in its own name procure the performance of the entire transport*, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL [and] b) assumes liability as set out in these conditions.

JA 86 (¶ 2.1) (emphasis added). The FBL provides further that, subject to other conditions, the Freight Forwarder "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." JA 86, JA 89 (¶¶ 2.2, 6.1) (emphasis added).

The FBL contains a Clause Paramount, which extends the applicability of mandatory laws and conventions, as well as a liability limitation clause. JA 91-93 (¶¶ 7, 8). The latter defines various rules for limiting the forwarder's liability in the absence of a declaration by Kirby of the true value of the goods and corresponding payment of a higher freight rate, and declares that the forwarder's liability will be governed by COGSA where applicable. JA 92, JA 93 (¶¶ 8.3, 8.6(b)). By not declaring the value of the goods, JA 78, Kirby elected to accept the FBL liability limitations and instead insured the shipment with Respondent MMI General Insurance Limited ("MMI"), Pet. App. 28a.

The FBL also contains a Himalaya clause, which extends these liability limitations to other parties used by ICC to perform the contract:

> These conditions apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in [the Clause Paramount].

JA 93-94 (¶ 10.1).

Finally, an additional clause in the FBL recognizes that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." JA 94 (¶ 10.2); see J. Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 67 (1993). Thus, by its very terms, the FBL purported to make persons (including independent contractors) "used in order to perform the contract" parties to

the ICC-Kirby contract of carriage. JA 94 (¶ 10.1); see Ramberg, *supra*, at 66.

Hamburg Süd's ship carried Kirby's machinery from Sydney to Savannah, Georgia. At Savannah, petitioner Norfolk Southern, which had been hired by the American arm of Hamburg Süd to transport the goods via train to their final destination, took over the containers for delivery to Huntsville, Alabama. The train carrying the containers derailed, allegedly causing approximately $1.5 million in damage to the machinery. Pet. App. 4a. Kirby recovered from its insurer, Respondent MMI. See *id.* at 4a n.4.

4. District Court Proceedings. Respondents filed a diversity suit against Norfolk Southern in the United States District Court for the Northern District of Georgia. Respondents advanced claims sounding in negligence, recklessness, bailment, and, in the alternative, breach of contract. JA 33-38. Respondents requested an award encompassing the full amount of the asserted damage caused to its machinery by the derailment as well as punitive damages. JA 38. In its answer, Norfolk Southern asserted, among other things, that respondents' claims were preempted by federal law and the railroad's liability, if any, was no greater than the $500 per package COGSA limitation incorporated by the relevant bill of lading. JA 42.

Soon thereafter, Norfolk Southern moved for partial summary judgment on the liability issue and to dismiss Respondents' state law claims. The district court granted the motion in both respects, concluding that the Himalaya clause in the Hamburg Süd bill of lading, which by its terms encompassed "inland carriers," covered Norfolk Southern and limited the railroad's potential liability to Kirby to $500 per container. Pet. App. 36a-37a. The district court likewise concluded that Respondents' state law claims were preempted by federal law. See *id.* at 37a.

The district court rejected the plaintiffs' argument that Kirby could not be bound to the agreement entered into by ICC with Hamburg Süd. After observing that "ICC does not transport cargo, but rather arranges for cargo transportation by carriers," Pet. App. 28a, the district court relied upon this Court's decision in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), to hold: "One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf," Pet. App. 37a. Thus, the court concluded, Kirby was bound by the Hamburg Süd bill, which covered transport of Kirby's goods through to Huntsville and specifically referenced "'inland[] Carriers.'" See *id.* at 36a-37a. The parties jointly requested certification for interlocutory appeal to avoid the expense of trial if Norfolk Southern's liability were subject to COGSA limits. The district court certified the case to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b), and that court granted review. Pet. App. 25a, 6a.

5. Decision Of The Court Of Appeals. A divided panel of the Eleventh Circuit reversed. Pet. App. 2a. The court first addressed the question whether Kirby was bound by the Hamburg Süd bill of lading. The court of appeals did not dispute that Norfolk Southern was covered by the plain terms of the Hamburg Süd bill's Himalaya clause, which covered "'participating (*including inland*) carriers,'" but held that Kirby would not be bound by the Hamburg Süd bill unless ICC had acted as Kirby's agent when it received the bill. See *id.* at 6a, 7a, 17a. The Eleventh Circuit held that "ICC was acting as a carrier – a principal – not as Kirby's agent" in contracting with Hamburg Süd. According to the court of appeals, "[i]f ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Süd to Kirby and listing Kirby as the shipper." *Id.* at 7a-8a. The court found its conclusion buttressed by the terms of the ICC bill that authorize ICC to procure transportation "'in its

own name'" and that declare that ICC has assumed the liability to Kirby as a carrier. *Id.* at 8a-9a (emphasis omitted).

Turning next to the ICC FBL to which Kirby clearly was a party, the court of appeals held that Norfolk Southern could not claim protection under its Himalaya clause either. This result followed, the court observed, because "the language of the clause does not specifically identify Norfolk Southern as a member of a well-defined class of its beneficiaries." Pet. App. 11a (citing *Herd*, 359 U.S. at 302). The court rejected Norfolk Southern's reliance on the Himalaya clause's extension of liability limitations to "'any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract.*'" Pet. App. 11a-13a (emphasis added). The Eleventh Circuit found the italicized language (save the parenthetical) "too vague" to pass its "clarity of language requirement." *Id.* at 12a. According to the court, "[t]his leaves, then, a Himalaya clause that extends to 'any servant, agent, or . . . any independent contractors.'" *Id.* It then held that Norfolk Southern (although an independent contractor) could not benefit from this phrase because it had not been hired by the freight forwarder. "In this Circuit, . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 13a-14a. Under *Herd*, moreover, the Eleventh Circuit interpreted the Himalaya clause to lack the "linguistic specificity" necessary to cover inland carriers, notwithstanding the fact that the bill was a "'through bill'" designating an inland point as the final delivery destination. See *id.* at 15a-16a.

Judge Siler dissented on both issues. First, he deemed it irrelevant that there were two bills of lading, noting that the "bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight." Pet. App. 19a. Because Kirby fully expected and knew that ICC would contract with actual carriers to transport

the cargo, ICC could only have been acting as agent for Kirby in making those arrangements. See *id.*

Second, Judge Siler concluded that Norfolk Southern should in any event enjoy the protections of the Himalaya clause in the ICC bill, which covers "independent contractors" without qualification. Noting again that "Kirby knew that an inland carrier would have to be used" in order to transport the goods to Huntsville, the dissent opined that Kirby must have "agreed to a limitation of liability for the carrier" that would accomplish the last leg of the journey. Pet. App. 19a. Embracing what he viewed as the better rule followed by the Ninth Circuit, which focuses on "'the nature of the services performed compared to the carrier's responsibility under the carriage contract,'" Judge Siler concluded that the ICC bill's Himalaya clause protected Norfolk Southern. *Id.* at 20a (quoting *Akiyama Corp.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998)). The majority gave a "windfall" to Kirby's insurer based on a "technicality," while ignoring both that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier" and that Kirby "agreed to the limitation of liability on the part of ICC and all of its sub-contractors." *Id.*

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision has struck a double blow against carriers and other service providers in international commerce. In conflict with the precedents of this Court, and every other court to address the issue, it has wrongly held that a vessel carrier's bill of lading issued to a freight forwarder (including its Himalaya clause) is unenforceable against the cargo owner. It has also improperly converted this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), into a license for contract reformation, invoking hyper-technical rules to defeat contract language and the parties' clearly expressed intent.

I.

The court below erroneously held that when Kirby engaged the freight forwarder ICC to ship its goods, ICC did not act as an agent on behalf of Kirby in its dealings with the *actual* carrier of the goods (Hamburg Süd) because ICC had assumed the status of a carrier with respect to Kirby. This position was rejected more than a century and a half ago when this Court held that the liability limitation clause in a contract of carriage between a nonvessel carrier and a vessel carrier was binding upon the owner of the cargo, even if the nonvessel carrier had contracted in its own name and had assumed liability for the goods. The nonvessel carrier had the "possession of the owner" and was "considered in law the agent or servant of the owner" in placing the owner's goods with the vessel carrier; therefore, its contract with the vessel carrier was "in contemplation of law" a contract between the cargo owner and the vessel carrier. *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344, 380 (1848). This Court has consistently reaffirmed this rule, regardless of the dealings of the cargo owner and forwarder *inter se*. As this Court ruled in holding a cargo owner bound by a contract that a forwarder had executed in its own name with a rail carrier, it was enough that the forwarder "*had been intrusted with goods to be shipped by railway*, and, nothing to the contrary appearing, the carrier had the right to assume that the [forwarder] could agree upon the terms of the shipment." *Great N. Ry.*, 232 U.S. at 514 (emphasis added).

More recently, in analysis diametrically opposed to that of the Eleventh Circuit, this Court held that it was immaterial whether the forwarder had issued its own bill of lading, assumed carrier liability for the transportation of the goods, and contracted in its own name with the actual carrier. This Court recognized the "duality of character" of such a forwarder, who assumes carrier responsibilities to the cargo owner, but is a shipper in its dealings with actual carriers. *Acme Fast Freight*, 336 U.S. at 468, 478-80. Because

forwarders are shippers (not carriers) in contracting with rail carriers, this Court held that the cargo owner was bound to the contract made by the forwarder. See *id.* at 480-87. The cargo owner has authorized the forwarder to ship its goods by rail carrier and accordingly, the cargo owner "is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27 (citing *New Jersey Steam*, 47 U.S. (6 How.) 344, and *Great No. Ry.*, 232 U.S. 508).

This rule has been applied across all modes of transport, including under the Shipping Act, which governs all transactions in ocean commerce to and from the United States, including this one. A nonvessel common carrier (NVOCC) is explicitly recognized by statute as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and *is a shipper in its relationship with an ocean common carrier.*" 46 U.S.C. app. § 1702(17)(B) (emphasis added). In accord with *Acme Fast Freight*, courts recognize that an NVOCC acts as "the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." See, *e.g.*, *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171, 1176 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3400 (Nov. 22, 2002) (No. 02-813). Indeed, the ocean carrier's bill of lading by statute must be included in its published tariffs, and it would be discriminatory for different liability limitations to apply to shipments by nonvessel carriers than to shipments by others.

The Eleventh Circuit's rule not only contravenes precedent, but it undermines COGSA and the efficient trading practices that have arisen under the clean standards of existing law, where cargo owners are bound by any contract entered into by a person with authority to ship the goods by carrier. COGSA operates by imposition of mandatory terms, including liability limitations, in bills of lading. If the ocean carrier's bill of lading is unenforceable against the cargo owner, the real party-in-interest in any contract for transportation of its

goods, the statute is effectively nullified. Current law, moreover, is extraordinarily efficient for all concerned. In the usual case where the value of goods is undeclared, carriers and their subcontractors (to whom COGSA limits are extended by Himalaya clauses in the ocean carrier's bill of lading) can rely on limited liability in charging lower rates; they need not identify the owners of goods and contract separately with them, which is not only a practical impossibility but in many circumstances unlawful. Shippers benefit from this scheme, receiving lower rates and relying on cargo insurance to cover any risk of loss. Cargo insurers in turn are compensated fully by their premiums charged for the risk of loss beyond the COGSA limit. The Eleventh Circuit's aberrant holding is not only contrary to law, but it gives cargo owners and insurers (like respondents) a wholly unwarranted windfall at the expense of carriers, destroys the certainty in the allocation of liability that COGSA intends to provide, and, if upheld, will lead to a host of inefficient and imperfect attempts on the part of carriers to mitigate their risks. This Court should restore certainty by deciding this case on the basis of the first question presented and by affirming the law established by its precedents.

II.

The court below also erred by holding that Norfolk Southern could not invoke the protections of the Himalaya clause of the ICC FBL, which extends liability limitations to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a. The Eleventh Circuit's holding rests on a fundamental misreading of *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). *Herd* enjoins courts to determine what liability limitations "the contracting parties intended" and "in some way have expressed it in the contract," looking first to the plain language of the instrument; its rule of strict construction applies only if the limitation clause is ambiguous. *Id.* at 302,

305; see *Texas & Pac. Ry.* v. *Reiss*, 183 U.S. 621, 626 (1902). *Herd* does not authorize a court to rewrite the contract, as the Eleventh Circuit unabashedly did here; the court impermissibly struck as "too vague" the categorical contract language extending carrier liability limitations to '"'any . . . other person whose services have been used in order to perform the contract.'" Pet. App. 12a (omission in original).

Nor does *Herd* permit a court to construe the phrase "any independent contractor" to exclude an independent contractor like Norfolk Southern just because it happens to be an inland carrier not in privity with the freight forwarder. Such a construction runs contrary to the language of the contract and the intent of the parties; indeed, it is a manifestly absurd interpretation of a self-described "multimodal transport contract" with an inland destination, JA 74, where inland carriage by third parties is contemplated, and almost all service providers in the chain of international transportation are not in privity with the freight forwarder. In all events, such a construction cannot be maintained because the persons covered by the Himalaya clause are also the only persons for whose acts and omissions the freight forwarder (as carrier) assumes liability. The Himalaya clause and the carrier responsibility clause are both meant to cover comprehensively all persons performing services under the "multimodal transport contract," and it would be against all principles of strict construction to interpret a contract of adhesion expansively in favor of the contracting carrier. The Eleventh Circuit's arbitrary application of *Herd* to defeat the intent of the parties is wrong as a matter of law.

ARGUMENT

I. KIRBY IS BOUND BY THE TERMS OF THE HAMBURG SÜD BILL OF LADING.

Norfolk Southern carried Kirby's cargo under the through bill of lading issued by Hamburg Süd, the ocean carrier, to

ICC, the freight forwarder employed by Kirby. The Eleventh Circuit acknowledged that the Himalaya clause of the Hamburg Süd bill by its terms covers "participating (including inland) carriers." JA 63 (¶ 5(b)), like Norfolk Southern. Pet. App. 17a. The Eleventh Circuit nonetheless held that the Hamburg Süd bill (and the contract of carriage manifest therein) was unenforceable against Kirby because the bill was issued to ICC, not Kirby. The Eleventh Circuit relied solely on the ICC's assumption of the duties of a carrier with respect to Kirby. Pet. App. 7a-8a. From this undisputed fact, the Eleventh Circuit held that ICC could not have been Kirby's agent in contracting with the actual carriers who would transport Kirby's goods. See *id.* at 7a. This holding is contrary to 150 years of common carrier law, including precedents of this Court directly on point. A freight forwarder, even if a carrier in relation to the cargo owner, is a shipper in relation to the actual carrier, and is therefore the agent of the owner in contracting with the actual carrier to carry the owner's goods.

A. Decisions Of This Court Require Enforcement Of The Hamburg Süd Bill Of Lading Against Kirby.

For more than 150 years, this Court has recognized that when a carrier issues a bill of lading to a freight forwarder, the carrier is entitled to enforce the terms of that bill against both the freight forwarder and the owner who authorized the freight forwarder to ship his goods. This rule prevails whether or not the forwarder contracts with the actual carrier in its own name, issues its own bill of lading, or otherwise assumes the duties of a common carrier with respect to the owner. The question that the Eleventh Circuit thought "pivotal," Pet. App. 7a – whether ICC was Kirby's carrier – is, under this Court's decisions, legally irrelevant. Hamburg Süd's bill of lading is enforceable against Kirby regardless of how Kirby and ICC structured their dealings *inter se*.

1. The Court first applied this controlling rule of law in *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47

U.S. (6 How.) 344 (1848). In that case, William Harnden "was engaged in the business of carrying for hire small packages of goods . . . for any persons choosing to employ him" between Boston and New York. *Id.* at 379. Merchant's Bank hired Harnden to transport specie from New York to Boston. See *id.* at 379-80. Harnden did not himself transport the goods. Rather, he contracted in his own name with the steam vessel owners to carry a crate containing his shipments at a monthly rate. See *id.* at 379. The contract between Harnden and the vessel owners provided that the latter assumed no liability for loss of the goods; Harnden was to inform the shipper that Harnden assumed the risk of loss. See *id.* When the vessel sank, the bank (and its directors) sued the vessel owners to recover the lost specie.

The vessel owners argued that the bank libellants had no right of action against them because "there is no contract – no privity of contract – between them and us." *Id.* at 366 (brief of plaintiffs in error). This Court rejected that argument, holding that "the contract between Harnden and the [vessel owners] for the transportation of the specie was, in contemplation of law, a contract between them and the [bank]; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names." *Id.* at 380. This Court expressly considered and rejected the argument – advanced by Kirby here – that the result turned on whether Harnden's contract with the bank established a common carrier relationship between Harnden and the bank, or an ordinary agency relationship between them. According to this Court, if Harnden was a simple agent, he "clearly" could bind the bank to a contract with the vessel owners. *Id.* Even if he was a carrier, moreover, he was "*considered in law the agent or servant of the owner*, and the possession of the agent is the possession of the owner." *Id.* (emphasis added). This Court held that the contractual limitation of the vessel owner's liability in its contract with Harnden was binding on the cargo

owners, see *id.* at 384 (the vessel carriers "succeeded in restricting their liability as carriers by the special agreement"), but interpreted the liability clause not to extend to the gross negligence proven at trial, see *id.* at 382-84.[5]

Put simply, *New Jersey Steam* stands for the proposition that a carrier may enforce the lawful terms of its contract of carriage with an intermediary authorized to ship the owner's goods (ICC here) against the cargo owner (Kirby). This is so even if the intermediary contracted in its own name with the vessel carrier, and even if the intermediary is also a carrier with respect to the cargo owner.

This Court has never wavered from the *New Jersey Steam* rule. In *York Co.* v. *Central R.R.*, 70 U.S. (3 Wall.) 107 (1865), Trout & Son entered into a contract in its own name with a railroad for steamship carriage from Memphis to Boston of a shipment of cotton owned by York. See *id.* at 107-08. The contract of carriage, by the terms of the bill of lading issued by the railroad to Trout & Son, exempted the railroad from liability for loss due to fire. See *id.* at 107. After the cargo was destroyed by fire in transit, York sued the railroad, alleging that the railroad had common-law liability as a common carrier for the full value of the goods for failure to deliver the goods safely. It argued that although Trout & Son "had authority to ship, [they] had no authority to agree to any restriction on the carriers' common liability," and "[t]heir authority to forward was certainly, of itself, not an authority to make an unusual and special contract" binding upon the owner. *Id.* at 108-10. This Court nonetheless enforced the limitation of liability against the cargo owner, noting that the rule that a common carrier may limit by special contract its

[5] Five justices concurring in the judgment agreed that the cargo owners were bound by the subcontract, *see also New Jersey Steam*, 47 U.S. (6 How.) at 393 (Catron, J.), and the plurality opinion is the holding of the Court because it supplies the narrowest ground for decision among the concurring justices, *see Marks* v. *United States*, 430 U.S. 188, 193-94 (1977).

liability for carriage of goods, and therefore reduce its duties to that of an ordinary bailee, had "received the sanction of this court" in *New Jersey Steam*. *Id.* at 111-12. Trout & Son's authority to ship the goods constituted the owner's assent to the express contract limiting liability, even though the owner did not contract directly with the railroad, no agency relationship was disclosed to the carrier, the contract was in the name of Trout & Son only, and Trout & Son had acted beyond their authority as agents in agreeing to the special contract. See *id.* at 112-13. The railroad was entitled to rely upon the terms of its contract of carriage, for "[s]o far as the defendant could see, [Trout & Son] were themselves the owners." *Id.* at 113. A cargo owner is bound by the contracts between a carrier and a third party who has authority from the owner to ship its goods with that carrier. See also *Reid* v. *Fargo*, 241 U.S. 544, 545, 551 (1916) (enforcing steamship's liability limitation against the cargo owner, even though the express company/forwarder had issued its own bill of lading, contracted with the steamship in its own name and failed to declare value as the owner had wanted).

2. This Court has also consistently applied the *New Jersey Steam* rule in cases involving surface carriers. It has definitively rejected the Eleventh Circuit's position that a freight forwarder that has assumed the duties of a carrier vis-à-vis the cargo owner cannot bind the cargo owner in contracting with the actual carrier to transport the owner's goods.

In surface as well as marine transportation, freight forwarders initially performed limited functions on the cargo owner's behalf, assuming only the duties of an agent to its shipper. This type of forwarder (deemed by this Court an "agent-forwarder") "went no farther than procuring transportation by carrier and handling the details of shipment." *Acme Fast Freight*, 336 U.S. at 484. "When goods handled by an agent-forwarder were lost or damaged, it

was liable to the shipper only for its own negligence, including negligence in selecting a carrier." *Id.* at 484-85.

By the middle of the nineteenth century, however, a different kind of freight forwarder began to emerge, structuring its relations with the cargo owner differently so as to profit from the consolidation of shipments from multiple owners. "The freight forwarder charged a rate covering the entire transportation" and "held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee." *Id.* at 484 & 485 n.23. The forwarder "operate[d] upon the margin of profit represented by the difference between railroad carload rates paid by the forwarder and the higher rates, approximating less than carload rates, which the forwarder charged the owner of a shipment." *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 346 (1940).

It was essential to the forwarder that the customer be at least indifferent as to whether it would transact with the forwarder or the actual carrier, and so commonly the forwarder's contracts with the customer evolved to mirror those of the actual carrier. The forwarder accordingly would issue to his customer "his own contract corresponding in form to through bills of lading and assume[] responsibility for safe through carriage." *Id.* at 345. Because such forwarders held themselves out to the public to transport goods for hire with responsibility for safe delivery of the goods, which was the common-law standard for common carriage, courts by at least 1850 began to affix the legal duties of common carriers upon them even though they operated no vessel or vehicle that would actually transport the goods. See, *e.g.*, *Acme Fast Freight*, 336 U.S. at 484-85 & n.23; *Krender* v. *Woolcott*, 1 Hilt. (N.Y.) 223 (1856); *Teall* v. *Sears & Griffith*, 9 Barb. 317, 320-22 (N.Y. Gen. Term 1850). As this Court stated, when the freight forwarder "contracted to deliver the goods to the consignee at rates set by itself,"

> the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault. The fact that the forwarder did not own the carriers whose services it utilized was held to be immaterial. Its undertaking was to deliver the shipment safely at the destination. Common carrier liability was the penalty for failure of fulfillment of that undertaking.

Acme Fast Freight, 336 U.S. at 485 (footnote omitted).

Even though the forwarder assumed the duties of a common carrier towards the owner of the goods, it was not regarded in law as equivalent to an actual carrier in its dealings with such carriers. The forwarder's principal function was still shipping (not transportation) in dealing with the carriers, even though it had restructured its relationship with its customers to allow it to arbitrage (and profit from) rate differentials: "Forwarders utilize common carriers by rail and motor truck to transport *goods owned by others*." *Chicago Heights*, 310 U.S. at 345 (emphasis added). They "arrange[] for the pickup, assembly and transportation of the shipments by carriers for hire," and "forwarders, not the owners of the goods, select the carriers and route the shipments." *Id.* at 345-46. Because the forwarder performed essentially a shipping function, and not transportation, this Court had no trouble ruling that forwarders were shippers in placing freight with the actual carrier, and the carriers were to treat their shipments no differently from other shipments (such as those placed by the owners themselves).[6]

Given that the cargo owner entrusts the freight forwarder with authority to ship its goods, this Court early on held that

---

[6] *See ICC* v. *Delaware, Lackawana & W. R.R.*, 220 U.S. 235, 252-53 (1911) ("nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation"); *accord Lehigh Valley R.R.* v. *United States*, 243 U.S. 444, 445 (1917) ("although the [freight forwarder of goods from overseas] may be in no case the owner, that does not concern the [carrier]").

the cargo owner was bound by the contract of carriage that the freight forwarder (as shipper) had entered into with the actual carrier. See *Great N. Ry.*, 232 U.S. at 514-15. In the *Great Northern Railway* case, O'Connor contracted to have personal goods shipped with the Boyd Transfer Company, a transfer company and freight forwarder that "d[id] business in the nature of a common carrier," shipping consolidated cargo and receiving bills of lading from the railroad "in its name." *O'Connor* v. *Great N. Ry.*, 136 N.W. 743, 744 (Minn. 1912), *rev'd, Great No. Ry.*, 232 U.S. 508 (1914). Boyd did not itself carry the goods, but contracted in its own name with the railway, and accepted a limitation on the railway's liability for less than the actual value of the goods being shipped (and the consequent reduction in shipping rate from the railway). See 232 U.S. at 513. The terms of O'Connor's contract with Boyd were "not stated," *id.* at 509, but O'Connor claimed that she had not authorized Boyd to consolidate her shipment with others or to accept the limitation on the railway's liability, see *id.* at 510. Indeed, O'Connor had indicated to Boyd that as she had no insurance, "she was willing to pay the regular rates." *Id.* When the goods were lost in transit, O'Connor sued the railway for the full value of the goods.

This Court held that the railroad's limitation on liability was enforceable against the owner. It was enough that the forwarder "*had been intrusted with goods to be shipped by railway*, and, nothing to the contrary appearing, the carrier had the right to assume that the Transfer Company could agree upon the terms of the shipment, some of which were embodied in the tariff." *Id.* at 514 (emphasis added). This Court reached this conclusion without determining whether Boyd was an ordinary agent or a common carrier with respect to O'Connor. See *id.* at 509. The terms of that relationship, far from "pivotal," as the Eleventh Circuit supposed, Pet. App. 7a, were irrelevant. For this Court, the same outcome prevailed "whether [Boyd] be treated as agent or Forwarder." 232 U.S. at 514. In either event, "[t]he carrier was not bound

by her private instructions or limitation on the authority of the Transfer Company." *Id.* By entrusting its goods to the forwarder for shipment by a common carrier, the cargo owner authorizes the freight forwarder to bind it to the carrier's terms of carriage.

This Court reaffirmed this rule in *Acme Fast Freight*. That case concerned the Freight Forwarder Act of 1942, an amendment to the Interstate Commerce Act ("ICA"), which for the first time regulated freight forwarders. The 1942 Act mandated that "the forwarder issue bills of lading to its shippers, covering transportation of the individual shipments to their ultimate destinations," and making the forwarder "liable to its shipper for loss or damage to the freight exactly as if it were an initial carrier" regulated under other parts of the ICA. 336 U.S. at 469. The question in *Acme Fast Freight* was whether the railroad was still entitled to rely on its own bill of lading (and in particular a limitation on its liability to claims filed within nine months of the loss), or whether its liability would be determined by the terms of the freight forwarder's bill of lading. See *id.* at 469-70, 480.

This Court held that the terms of the actual carrier's bill of lading must be enforced. The 1942 Act was "not intended to change the shipper-carrier relationship that had for many years existed between forwarder and railroad." *Id.* at 470. A forwarder that issues its own bill of lading to the cargo owner and assumes liability for the entire transit "has some of the characteristics of both carrier and shipper." *Id.* at 467. "In their relations with shippers, forwarders unquestionably perform functions and have duties similar to the functions and duties of common carriers," but "forwarders occupy a different position in their dealings with the carriers whose services they utilize." *Id.* at 477-80. They remain "shippers *vis-à-vis* carriers," and were not equivalent in law to initial carriers, or express companies that purchase capacity from rail carriers. *Id.* at 478-80 & n.17. When the forwarder argued "that the liability provisions of the uniform rail bill of

lading issued to the forwarder for his carload shipment may be disregarded," and "that the railroad need not issue its bill of lading at all." *id.* at 479, this Court responded that it could not "believe that the contention is seriously made. The underlying carrier's haul involves a different shipment, a different consideration, a different origin, a different destination, and a different consignor and consignee than are involved in the forwarder's undertaking." *Id.* at 480. The Court, citing *New Jersey Steam* and *Great Northern Railway*, emphasized that the carrier's contract governed its liability both to the forwarder and to the forwarder's shipper (*i.e.*, the cargo owner or consignor), for that "shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27.

Indeed, this Court has never held a bill of lading binding only on the named shipper. Rather, it has always recognized that "the bill of lading is a contract between the transportation company *and him who is interested in the shipment*." *Michigan Cent. R.R.* v. *Mark Owen & Co.*, 256 U.S. 427, 430 (1921) (emphasis added) (suit by consignee). It matters not whether the owner is consignor or consignee, see *Railroad Co.* v. *Androscoggin Mills*, 89 U.S. (22 Wall.) 594 (1874) (enforcing liability limitation against consignee who did not contract with the carrier); see also *Constable* v. *National S.S. Co.*, 154 U.S. 51 (1894) (same); A. Dobie, *Handbook on the Law of Bailments and Carriers* § 154, at 499-500 (1914), or uses an intermediary to ship its goods.

This Court's cases, involving both marine and surface carriage, are accordingly dispositive of the issue in this case. Contrary to the Eleventh Circuit's analysis, Pet. App. 7a-9a, it is simply irrelevant that a freight forwarder does not act strictly as an "agent-forwarder," that it issues its own bill of lading, that it contractually assumes the liability of a carrier for the entirety of the journey from origin to destination, that it selects the actual carrier, and that it contracts with that carrier in its own name and for its own profit. The forwarder

is authorized to ship the owner's goods with an actual carrier, and therefore the owner is "the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Acme Fast Freight*, 336 U.S. at 488 n.27; *Great N. Ry.*, 232 U.S. at 514. Furthermore, the carrier's limitation on liability applies regardless of whether the cargo owner attempts to sue in tort or in contract. See *Queen of the Pacific*, 180 U.S. 49, 53 (1901) (stating that it would be "unreasonable" to hold that a provision in a bill of lading requiring claims to be filed within 30 days "should apply if the action were in contract, but should not apply if it were in tort"); *Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Inc.*, 235 F.3d 53, 61 (2d Cir. 2000); Dobie, *supra* § 155, at 504. Indeed, cargo owners have never been allowed to escape a contractual limitation on liability based on claims that they were not parties to the contract, so long as they consented to shipment of their goods by that carrier: "Where . . . goods have been shipped with the consent of the owner, though not under contract with him, he will not be in a position to claim against the shipowner for the consequences of a tortious act, if the shipowner is exempted from liability for such acts by the contract with the shipper." T. Carver, *A Treatise On the Law of Carriage of Goods By Sea* § 67, at 93 (7th ed. 1925) (citing common-law cases).[7]

---

[7] The Eleventh Circuit's position is also inconsistent with basic principles of bailment, which are not limited to the special circumstance of freight forwarders. Bailment requires a voluntary acceptance of possession of goods owned by another; "[t]he bailee must consent to possession of the goods." Bugden, *supra*, at 166, 168. The carrier's bill of lading represents the terms on which it consents to possession and carriage of the goods, *see* Dobie, *supra* § 125, at 374, and the carrier bill may be enforced against the cargo owner if the owner has granted another the general authority to ship the goods with such a carrier, *see The St. Hubert*, 107 F. 727, 732 (3d Cir. 1901) (holding that the acceptance of a bill of lading that contained a limitation of liability provision by an original carrier from a subsequent carrier "may be considered within the general powers conferred upon the original carriers by the shippers and

B. The Rule That The Owner Is Bound By The Freight Forwarder's Contracts With The Actual Carrier Applies Across All Modes of Transport.

The law described above is so settled on this point that a leading treatise on the transport of goods states the rule in unequivocal terms as applying to all modes of transport. Whether transport is by air, rail, sea or motor carrier, the rule is the same. The contract in a bill of lading issued to a freight forwarder is effective against a shipper even when the shipper is not named on the carrier's bill issued to the forwarder and lacks direct privity with the actual carrier.[8]

In particular, courts have long held that the *New Jersey Steam/Acme Fast Freight* rule is applicable to ocean carriage under the Shipping Act. As noted above, the container revolution provided a financial incentive for freight forwarders dealing with ocean carriers to consolidate smaller shipments into a single, full container shipment which they

owners, even without the express evidence alluded to of knowledge of and acquiescence in the" subsequent carrier's bill).

[8] *See* 1 Sorkin, *supra* §§ 5.32[1], at 5-264 (stating that for goods transported by sea "the shipper and the consignee of the goods are bound by the terms of the bill of lading issued by the actual carrier to the NVOCC, including the limitation of liability contained in the actual carrier's bill of lading"); *id.* § 5.34[1], at 5-272 (stating that for goods transported by motor carrier or rail "[t]he customer of the freight forwarder . . . remains subject to the terms of the bill of lading and tariffs of the actual carrier including limitations of liability, requirements for notice of claim, and limitation of action provisions" even when the "original shipper was not a named party to the bill of lading or contract made by the motor carrier or rail carrier") (footnotes omitted); 3 *id.* § 13.07[1], at 13-122 (stating that limitation of liability in air waybill applies "even where the suit is brought by a plaintiff who is not a party to the contract of carriage"); *see generally Nippon Fire*, 235 F.3d at 61 ("common carriers are entitled to assume 'that one presenting goods for shipment either owns them or has authority to ship them,'" and therefore the primary carrier is the "agent" of the shipper in contracting with secondary carriers); *Puerto Rico Mar. Shipping Auth.* v. *Crowley Towing & Transp. Co.*, 747 F.2d 803, 804-05 (1st Cir. 1984) (same).

ship in their own (forwarder's) name with the ocean carrier, just as their surface freight forwarder counterparts had done with surface carriage. See *ILA*, 447 U.S. at 496 n.8. The Federal Maritime Bureau, the predecessor to the Federal Maritime Commission, examined this kind of forwarder in 1961. See *Common Carriers by Water – Status of Express Cos., Truck Lines & Other Non-Vessel Carriers*, 6 F.M.B. 245, 248-49 (1961). It concluded that such forwarders should be treated as "common carriers" under the Shipping Act if they behaved in essentially the same way as surface freight forwarders who were treated as common carriers under the ICA.[9] The functional and definitional similarities between surface freight forwarders and NVOCCs were observed by courts. See *New York Foreign Freight Forwarders & Brokers Ass'n* v. *ICC*, 589 F.2d 696, 705-06 (D.C. Cir. 1979) (stating "it is difficult to perceive how the role of the NVO[CC]s in this process differs materially from the role of a freight forwarder; each stands as a shipper with respect to the . . . carrier"); 3 Sorkin, *supra* § 14.15. Courts rightly understood the NVOCC, like the surface freight forwarder, to be "a hybrid"; with respect to the cargo owner, the forwarder acts as a carrier, but "[w]ith respect to the vessel and her

[9] The FMB and the ICA's freight forwarder provisions classified forwarders as common carriers if they met three essential criteria: (1) they consolidated small loads into full container loads and shipped the goods with the actual carrier in the forwarder's own name, (2) they assumed the responsibilities of common carrier through the entire voyage of the goods, and (3) they contracted with an underlying carrier to perform some or all of the actual carriage. *Compare* 6 F.M.B. at 256-57 (FMB ruling on ocean forwarders), *and* Practices of Licensed Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers, 28 Fed. Reg. 4300, 4300 (May 1, 1963) (defining "non-vessel operating common carrier" or NVOCCs), *with* 49 U.S.C. § 1002(a)(5) (1958) (repealed 1978) (ICA provision defining surface "freight forwarder"). The FMC did treat NVOCCs distinctively in allowing them to file joint rate tariffs, *see* Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States, 35 Fed. Reg. 6394, 6397 (Apr. 21, 1970), but that issue is not relevant here.

owner," it acts as "an agent of the shipper." *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 (2d Cir. 1984).

In 1984, Congress confirmed the dual role of NVOCCs – common carrier with respect to the actual shipper and shipper with respect to the actual carrier – when it, for the first time in a statute, defined an NVOCC as "a common carrier that does not operate the vessels by which the ocean transportation is provided, *and is a shipper in its relationship with an ocean common carrier*." 46 U.S.C. app. § 1702(17)(B) (emphasis added). Courts have therefore continued to recognize the dual role of NVOCCs, and that the NVOCC acts as "the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Kukje Hwajae Ins.*, 294 F.3d at 1176; see also *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994); *Ariel Mar. Group*, 1985 W.L. 148948, at *1 (FMC decision recognizing dual character of NVOCCs).

Indeed, as noted above, *Acme Fast Freight* cited the nondiscrimination principle of common carrier regulation as one reason why an actual carrier's obligations to the underlying shipper must be defined by its own bill of lading, even when issued to a forwarder and not to the actual shipper. See 336 U.S. at 480-81. An ocean carrier publishes a tariff, including its bill of lading. See 46 U.S.C. app. § 1707(a)(E); JA 60 (Hamburg Süd bill ¶ 2 providing that "Goods carried hereunder are subject to" applicable FMC tariffs). And, as the FMC has ruled, an ocean carrier generally may not discriminate among shippers (including NVOCCs), draw distinctions based on ownership of the goods, or deviate from the published tariff. See 46 U.S.C. app. § 1709(b); 50 Fed. Reg. 38,896, 38,897 (Sept. 25, 1985); Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States, 50 Fed. Reg. 14,704, 14,708 & n.5 (Apr. 15, 1985) (citing *Delaware, Lackawanna, & W. R.R.*, 220 U.S. at 252). Under the decision below, an NVOCC like ICC would impermissibly receive preferential terms (greater carrier

liability to the beneficial owner of the goods) than other shippers subject to the same tariff. See *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 654 (1913) (liability limitations are part of the filed rate). For all the reasons that the actual carrier's bill of lading controlled in *Acme Fast Freight*, Hamburg Süd's bill of lading is controlling in this case.[10]

Here, there can be no dispute that Kirby had "entrusted" ICC "with goods to be shipped by [the actual carrier]," *Great N. Ry.*, 232 U.S. at 514, and therefore was bound by ICC's contract with Hamburg Süd. This is implicit in every forwarding relationship of this kind: "A shipper which tenders cargo to an NVOCC does so with the clear understanding that the cargo will, in turn, be tendered to a vessel-operating carrier." 50 Fed. Reg. at 14,708; see *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276, 280 (2d Cir. 1992). Not only was Kirby on notice by the ICC bill that the goods were already shipped aboard the Queensland Star, but

[10] The Eleventh Circuit's rule is also at odds with the fundamental character of common carriage. A shipper (whether the owner, or a freight forwarder or merchant acting with the authority of the owner) who places goods with a carrier grants the carrier a right of "special property" in the goods; the carrier not only takes possession of goods for transit, but it acquires a lien on those goods for its freight and other charges. Dobie, *supra*, § 13, at 27; *id.* § 149, at 473-77, 481-83. It would be absurd to hold that the freight forwarder does not act with the authority of the cargo owner in placing goods with the actual carrier and therefore granting the carrier rights in the property to the potential detriment of the owner. Indeed, the carrier's rights have never been held to vary depending on the nominal party to the contract; a carrier's lien can be enforced to the detriment of a consignee who is not a party to the carrier's bill of lading even when an agreement between the consignee and consignor allocated the obligation to pay freight charges to the consignor. *See Pittsburgh, Cincinnati, Chi. & St. Louis Ry.* v. *Fink*, 250 U.S. 577, 581 (1919); *Hall Corp. of Can.* v. *Cargo Ex Steamer Mont Louis*, 62 F.2d 603, 605 (2d Cir. 1933) (holding that a carrier's lien arising out of the contract between consignor and carrier is effective to bind a cargo owner who was not a party to the contract); 4 Sorkin, *supra* § 26.01, at 26-2 (The carrier's "lien can be discharged and the consignee becomes entitled to the goods only upon tender or payment to the carrier of the legal rate").

that bill specifically authorized ICC to procure transportation of the goods from others. JA 78, JA 86 (¶ 2.1). The fact that ICC was authorized to procure such transportation in its own name, assumed the responsibility of a carrier to Kirby, and issued its own bill of lading to Kirby does not defeat the special agency granted the forwarder in placing the owner's goods with actual carriers. See *Acme Fast Freight*, 336 U.S. at 484-87 & n.27; 14 Am. Jur. 2d *Carriers* § 558 (2000) (authorization to ship goods with a carrier includes incidental authority to accept the carrier's terms).[11]

The Eleventh Circuit's mechanical reasoning that ICC's assumption of carrier duties towards Kirby precluded it from binding Kirby in contracting with carriers to transport Kirby's goods is contrary to an unbroken 150 years of common carrier law. See Bugden, *supra* § 2-01, at 8 ("It is of course quite possible for the freight forwarder to act as agent to his customer and as principal to the third party, or indeed vice versa. In any event it is a fallacy to suppose that a person cannot be a party to a contract in two capacities, both as agent and principal."). This Court should adhere to its longstanding precedent and reverse the decision below.

C. Adoption Of The Rule Below Would Undermine COGSA And Settled, Efficient Trade Practices.

The Eleventh Circuit's rule must be rejected not only because it contravenes the precedent of this Court, but also because it would undermine COGSA and settled and efficient practices in international trade.

---

[11] Indeed, despite its position before the Eleventh Circuit, Kirby has sued Hamburg Süd in Australia under the latter's bill of lading, alleging that Kirby was "at all material times the owner of the goods, the holder of the [Hamburg Süd] bill or the person entitled to possession of the goods and to delivery to it of the goods," and that Kirby "is entitled to claim under and in respect of the [Hamburg Süd] Bill, the contract of carriage therein and in respect of loss or damage to the goods." JA 26 (¶¶ 20-21) (emphases omitted).

COGSA "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading," Gilmore & Black, *supra* § 3-25, at 145, and specifically by imposing statutory mandates as "compulsory terms" in the bill, *id.* § 3-38, at 172. The decision below eliminates the basic assumption underlying COGSA: that the bill of lading defines the rights and responsibilities, within the limits of the law, of the ocean carrier. According to the Eleventh Circuit, in the ordinary case of a cargo owner who contracts with a freight forwarder as a common carrier, the ocean carrier's bill of lading issued to the freight forwarder defines *none* of the carrier's rights and duties with regard to the owner, the real party-in-interest. If its bill of lading is unenforceable against the cargo owner, the vessel carrier cannot rely on COGSA's notice of loss or limitations of actions provisions (Section 3(6)), its limitations on liability to losses based solely on unseaworthiness for negligence (Section 4(1)), its substantial additions to the exceptions to the common law rule of absolute liability for carriers (Section 4(2)), and, of course, its default limitation of liability provision (Section 4(5)).[12] Absent the ability to define its rights and duties by contract under COGSA, the carrier is potentially subject to common-law liability as an absolute insurer of the goods.

The Second Circuit has rejected the Eleventh Circuit's rule precisely because it "would defeat COGSA's intended purposes of allocating risk of loss and creating predictable liability rules on which not only carriers but others can rely." *Stolt*, 962 F.2d at 279. "All those involved in a commercial maritime transaction must know who bears the risk of a potential loss so that they can decide who must insure against

---

[12] The carrier also would be deprived of the benefit of the nonmandatory terms of the bill of lading, even though such provisions may be critical to its pricing or business decisions. *Cf. Vimar Seguros y Reaseguros*, 515 U.S. at 533-41 (allowing a carrier's bill of lading to select forums and to require arbitration).

it and how much the insurance should cost." M. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1270 (1989). Yet, under the decision below, the vessel carrier (who will often have no idea whether its shipper is a forwarder or owner, see M. Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 396 (2000)), and those providing services under its bill cannot know their liability, or price or insure accordingly.

COGSA, and the longstanding "commercial norm" since *New Jersey Steam* that a cargo owner is bound by contracts of carriage entered into by one authorized to ship its goods, see *Kukje Hwajae*, 294 F.3d at 1176, have fostered an extraordinarily efficient system of trade. Rather than pay the high rates for goods of declared value, the cargo owner purchases transportation from the freight forwarder at the low cost associated with limited liability and undeclared value, and relies instead on cargo insurance (usually on an open policy covering all shipments, *supra* at 9-10) to protect against loss.[13] The freight forwarder can offer low rates because it likewise secures low rates (for its volume and consolidated shipments) from the vessel carrier by accepting that carrier's limitations on liability. For intermodal shipments, the carrier's low rates are further predicated on Paramount and Himalaya clauses that permit the vessel carrier to extend the COGSA limits inland and to third parties used to perform the contract of transportation. Such third party providers in turn offer competitive terms to vessel carriers because they can rely on the Himalaya clause to limit their

[13] *See* Sturley, *Part II*, at 179, 190 ("There is no unfairness in holding [shippers] to the terms on which they made their bargains," for "the true unfairness" is "imposing excess liability on a carrier that set its rates and conducted its business on the assumption that § 4(5) governed the transaction"); *accord Nichimen Co.* v. *M.V. Farland*, 462 F.2d 319, 335 (2d Cir. 1972) (Friendly, J.) ("[T]here is ... no need for shedding crocodile tears on behalf of the shipper or consignee."); *see also Hart* v. *Pennsylvania R.R.*, 112 U.S. 331, 340 (1884) (same).

liability risks. Indeed, Congress specifically authorized such contractual extensions so that shippers and carriers could "place all of their dealings under COGSA, if they so intend," and therefore achieve "a greater degree of certainty and uniformity in their dealings." *Wemhoener Pressen*, 5 F.3d at 741.

The Eleventh Circuit's rule vitiates this efficient system, and instead grants a windfall to cargo owners (and their insurers) who benefit from low rates by not declaring value, yet are not held to the *quid pro quo* of limited liability. Even respondent's counsel has recognized the inequity of the rule that he now defends:

> Litigation to avoid the § 4(5) limitation ... is not intended to bring justice to a poor, defenseless shipper who would otherwise suffer a large, uncompensated loss. The underwriter has already reimbursed the shipper for the loss pursuant to their insurance agreement. This is exactly what they contemplated when the shipper chose to insure the goods rather than to declare their value, and when the underwriter collected its premium to compensate it for bearing the risk that the goods would be lost or damaged. After the loss, the insurer, who collected a premium, seeks to recover from the carrier, who did not collect a premium, and who thought it was entitled to treat the goods as though they were worth only $500 per package.

Sturley, *Part II*, at 180-81 (footnote omitted). The Eleventh Circuit's rule will only promote uncertainty and higher costs of international trade through higher carrier rates or duplicative insurance purchased to cover risks already insured by the cargo insurer. This Court should adhere to settled law, and enforce the Hamburg Süd bill of lading against Kirby.[14]

[14] By contrast, cargo owners (and insurers) are never prejudiced by the established law that the limitation of liability in the actual carrier's bill of lading applies to them, even if that limitation is more severe than the

II. NORFOLK SOUTHERN'S LIABILITY IS LIMITED BY THE HIMALAYA CLAUSE IN THE ICC BILL OF LADING.

This Court should decide this case on the basis of the first question presented, because the fundamental principle of law that underlies modern intermodal transportation is that vessel carriers and their subcontractors rely on the terms of the carrier's bill of lading, see *Acme Freight*, 336 U.S. at 480, and no such provider can rely on the terms of forwarder bills of lading that are unknown to them. But if this Court holds that the Hamburg Süd bill is unenforceable against the cargo owner, Norfolk Southern is clearly protected by the ICC FBL.

The Eleventh Circuit held to the contrary, interpreting this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), to nullify certain contractual language, limit the construction of relational terms like "independent contractor" in a Himalaya clause only to those contractors in privity with the bill issuer, and require even greater "linguistic specificity" to cover inland carriers. Pet. App. 12a-17a. The Eleventh Circuit has fundamentally misconceived the rule of *Herd*.

---

amount to which the owner agreed to limit the forwarder's liability. They always have recourse against the forwarder to receive exactly the protection against loss for which they bargained. *See Great N. Ry.*, 232 U.S. at 514-15 (stating that "[i]f there was any undervaluation, wrongful classification or violation of [the shipper's] instructions . . . the [shipper] has her remedy against" the forwarder); *Nippon Fire*, 235 F.3d at 62; *The St. Hubert*, 107 F. at 733. The only theoretical risk is forwarder insolvency, but that is more properly borne by the cargo owner who selected the forwarder than by the carrier. In practice, the cargo owner does not bear that risk (because it has cargo insurance), nor does the cargo insurer, because it sets its premiums without regard to recovery from any carrier. *See* M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part I)*, 19 J. Mar. L. & Com. 1, 21 n.107 (1988). Furthermore, any conceivable risk is negligible since FIATA members are required to have liability insurance. *FIATA Legal Handbook*, at 143-44.

In *Herd*, a stevedoring company sought protection under a vessel carrier's bill of lading that provided that "'the Carrier's liability, if any, shall be determined on the basis of $500 per package'" under COGSA, and further provided that "'the Carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act.'" 359 U.S. at 299 n.2. This Court began by interpreting the plain language of the bill of lading. It stated that, "[l]ooking to the limitation-of-liability provisions of the bill of lading, we see that they, like § 1304(5) of the Act and its legislative history, do not advert to stevedores or agents." *Id.* at 302. The Court held:

> There is, thus, nothing in those provisions to indicate *that the contracting parties intended to limit the liability of stevedores* or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would *in some way have expressed it in the contract.* Since they did not do so, it follows that the provisions of the bill of lading did not cut off respondent's remedy against the agent that did the wrongful act.

Id. (emphasis added and brackets and internal quotation marks omitted).

The *Herd* Court then went on to reject the stevedore's "second contention" that it should adopt the rule that any reference to a carrier includes "all agents of the carrier who perform any part of the work undertaken by the carrier in the contract of carriage." *Id.* at 303. The Court held that such a rule was contrary to precedent and to the principle that:

> contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, *unless the clarity of the language used expresses such to be the understanding of the contracting parties.*"

Id. at 305 (emphasis added).

Thus, the central precept of *Herd* is that a bill of lading is to be interpreted based on what "the contracting parties intended." *Id.* at 302. In keeping with basic principles of contract interpretation, a court looks to the plain language of the bill to determine the intent of the parties:

> [W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

Green v. *Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823); see *Herd*, 359 U.S. at 302. So, in *Constable* v. *National S.S. Co.*, 154 U.S. 51 (1894), this Court, in exonerating a carrier for responsibility for goods destroyed by fire, refused to "affix . . . a technical meaning" to a liability limitation clause that was contrary to its plain intent. *Id.* at 72; see also *Texas & Pac. Ry.*, 183 U.S. at 629 (clause should have its "fair and reasonable meaning"); *Western Transit Co.* v. *A.C. Leslie & Co.*, 242 U.S. 448, 454 (1917) (rejecting construction of bill of lading that "does violence to the language used and is unreasonable").

The rule of strict construction comes into play only if the limitation clause is ambiguous.[15] Even then, "[t]he principle

---

[15] *See Texas & Pac. Ry.*, 183 U.S. at 626; *Mitsui & Co.* v. *American Export Lines, Inc.*, 636 F.2d 807, 822-23 (2d Cir. 1981). Even the dissenting justices in *Constable* who would have held the carrier liable acknowledged the "well-settled rule" that stipulations against liability are to be strictly construed against the carrier only "[i]n so far as they are ambiguous or leave the intentions of the parties in doubt." 154 U.S. at 81 (Jackson, J., dissenting).

of strict construction . . . does not mean that [words] must be given their narrowest possible meaning" and denied their "natural significance," *Singer* v. *United States*, 323 U.S. 338, 341-42 (1945), but only that the meaning of text "shall not be enlarged by inferences or implications not plainly to be drawn from the language," *District of Columbia* v. *Johnson*, 165 U.S. 330, 338 (1897); see *Herd*, 359 U.S. at 305; *Carib Prince*, 170 U.S. 655, 659 (1898).

The meaning of the Himalaya clause of the ICC FBL could hardly be more plain. It extends the bill's liability limitations not only to the carrier's servants and agents, but to "*any* . . . other person (including *any* independent contractor) whose services have been used in order to perform the contract." JA 94 (¶ 10.1) (emphasis added). The "multimodal transport contract" here is for "performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL": *i.e.*, from Sydney, Australia to Huntsville, Alabama. JA 86 (¶ 2.1(a)); JA 78. Norfolk Southern is indisputably "a person . . . whose services have been used in order to perform the contract": it carried the goods from Savannah, Georgia to Huntsville, Alabama. Given that the Himalaya clause comprehensively covers "any" person performing such services, it necessarily covers Norfolk Southern. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). To remove all doubt about its comprehensiveness, the clause clarifies that the term "any . . . other person" "includ[es] *any* independent contractor"; no independent contractor is excluded. See, *e.g.*, *Wemhoener Pressen*, 5 F.3d at 743 (finding subcontractor covered by Himalaya clause reaching "'any person whomsoever by whom the Carriage or any portion of the Carriage is performed or undertaken'") (emphasis omitted).

The plain meaning of the Himalaya clause is confirmed by other provisions of the bill. See *Androscoggin Mills*, 89 U.S. (22 Wall.) at 601; *Crossman* v. *Burrill*, 179 U.S. 100, 107 (1900). Critically, the same language defines the liability of the freight forwarder who issued the bill, and against whom its customer has primary recourse. The freight forwarder "assumes liability as set out in these conditions," and subject thereto "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." JA 86, JA 89 (¶¶ 2.1, 2.2, 6.1) (emphasis added).

If the Eleventh Circuit's crabbed construction of this language were adopted, then the freight forwarder would have an extraordinarily truncated liability. It would only have liability for goods if damaged by the independent contractor with whom it is in privity (Hamburg Süd), but not if damaged by any ocean carrier if Hamburg Süd had subcontracted the actual carriage, nor by any stevedore or other independent contractor of Hamburg Süd at either port, nor by any inland carrier whatsoever. This construction does violence to the plain language of the bill, which is clearly meant to create "back-to-back liability" of the freight forwarder and every person used to perform the contract of transportation from Sydney to Huntsville, including all actual carriers by land or sea. *FIATA Legal Handbook*, at 59-61, and to ensure "that the freight forwarder cannot avoid a liability for such other persons by referring to his status as an intermediary." Ramberg, *supra*, at 51. Indeed, respondents should not be heard to claim otherwise, for they have filed suit against ICC in Australia to hold it liable under its bill for Norfolk Southern's alleged default. JA 19-29. The language used in the liability clauses of the ICC bill must be given their plain

meaning. But even if that language were ambiguous, which it is not, the rule of strict construction cuts against the Eleventh Circuit's interpretation. Limitation clauses are construed against the carrier that issued the bill, see *Carib Prince*, 170 U.S. at 659, and this language cannot be read to limit severely ICC's liability to Kirby.

By disregarding the plain language of the bill, the Eleventh Circuit's decision does violence to *Herd*, and certainly is not faithful to it. Rather than determine which third persons "the contracting parties intended" to be covered, 359 U.S. at 302, the Eleventh Circuit has declared fixed rules of law to nullify the actual language used in the parties' contract. First, the court held that as a matter of law the term "'any . . . other person . . . whose services have been used in order to perform the contract'" failed its "clarity of language requirement." Pet. App. 12a (omission in original). The court accordingly shunted the parties' language aside, and remarkably rewrote the contract: "This leaves, then, a Himalaya clause that extends to 'any servant, agent, or . . . any independent contractors.'" *Id.* (omission in original). Contract construction, even the strict kind, does not entitle a court to strike the contract's language. See *Androscoggin Mills*, 89 U.S. (22 Wall.) at 601.

The Eleventh Circuit then turned its knife to the phrase "any independent contractor." It silently excised the word "any," and proceeded to announce its second rule of Himalaya clause law to limit the reach of contract language with a relational term like "independent contractor": "In this Circuit, . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a & n.10. The Eleventh Circuit claimed the parties "could have said so" if they wanted to cover independent contractors not in privity, ignoring that the categorical phrase "*any* independent contractor" does just that. The Eleventh Circuit's disregard of the language of the contract is breathtaking. The contract extends liability protection to a

broad class of which independent contractors are a subset: any persons used to perform the contract "including any independent contractor." JA 94 (¶ 10.1). Invoking idiosyncratic rules, the Eleventh Circuit denied liability protection not only to the *class* of persons the parties identified, but even to a specified *subset* of that class; it instead restricted Himalaya clause coverage to a *subset of the subset* of the class that the parties chose. Neither *Herd* nor common sense sanctions this result.

The Eleventh Circuit's "privity" requirement cannot be squared with the intent of the parties for another reason; it ignores the context of modern intermodal transportation. "Many non-vessel-operating carriers, or NVOCs, contract with the shipper to carry the cargo but then subcontract every aspect of the transportation," and "virtually every" ocean carrier (with whom the NVOC subcontracts) "subcontracts with separate companies to perform specialized aspects of the carriage"; indeed, there would be no other way to handle "the explosion of door-to-door shipments." Sturley, *Interim View*, at 79-80 (footnote omitted). For the reasons given above, the freight forwarder would not want to limit the Himalaya clause to only its direct subcontractor (the ocean carrier). The shipper (who has declined to declare value, accepted the carrier's liability limitations, and insured its goods for the entire transit) is indifferent not only to who performs the actual tasks of transport, but also to their contractual relation to the freight forwarder. See Mahoney, *supra*, at 3 ("shippers consider the word 'intermodal' to mean uniform conditions of carriage, and limits of liability, throughout the entire movement"). Indeed, respondents' counsel has rightly characterized "privity of contract" as an "irrelevant issue[]" in limiting the liability of intermodal providers. M. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. Mar. L.J. 1, 12 (2001). It makes no

sense to devise a rule imputing to contracting parties an intent to make privity the touchstone of Himalaya clause coverage.[16]

The Eleventh Circuit's invocation of *Herd* to deny Himalaya clause protection to inland carriers is likewise unsound. First, if question 1 is resolved against petitioner and (contrary to *Acme Fast Freight*, 336 U.S. at 478-80 & n.17) ICC is deemed an "initial carrier" rather than a shipper in its dealings with Hamburg Süd, then it is passing strange to presume an intent to exclude a "connecting carrier" like Norfolk Southern, since a connecting carrier under a through bill of lading is always entitled to the liability protections of the initial carrier. See *Mexican Light & Power Co.*, 331 U.S. at 734. Norfolk Southern would have the same liability as ICC even in the absence of a Himalaya clause.

Second, under *Herd*, a Himalaya clause does not lack clarity if it does not enumerate "inland carriers" as one of its

---

[16] The error of the Eleventh Circuit's privity rule is also underscored by the *legal* context of Himalaya clauses: namely, such clauses were drafted for the very purpose of overcoming antiquated privity rules. Modern clauses respond not only to *Herd*, but also to a British decision, *Scruttons Ltd.* v. *Midland Silicones Ltd.*, [1962] A.C. 446 (1961), which invoked the strict doctrine of privity then prevailing in English law to deny third-party beneficiary status to stevedores. *See* Robertson, *supra*, at 369. Carriers began including clauses like ¶ 10.2 of the FBL, which states that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract," JA 94 (ICC bill ¶ 10.2), as a device to satisfy privity requirements, *see* Ramberg, *supra*, at 67; *see also New Zealand Shipping Co.* v. *A.M. Satterthwaite & Co.*, 1 Lloyd's Rep. 534, 539 (P.C. 1974) (appeal taken from N.Z.) ("*The Eurymedon*") (permitting stevedore to assert time bar defense as set forth in carrier's bill of lading). The Eleventh Circuit's privity rule, moreover, is especially perverse when applied to a freight forwarder's bill of lading because (as noted above) the only covered entity would be the initial ocean carrier with whom the forwarder is in privity. The net result is that all the third-party providers (including stevedores) for whose benefit these legal devices were invented are excluded from the protection of the Himalaya clause in the FBL.

beneficiaries. Categorical language, like that actually used in clause 10.1, is no less clear in its coverage than a laundry list, which creates definitional problems regarding specific terms, and ambiguity under the *expressio unius* principle if a service provider is omitted. In any event, *Herd* certainly does not command "linguistic specificity." Pet. App. 16a; this Court required only that "contracting parties . . . *in some way* have expressed [an intent to limit the third party's liability] in the contract." 359 U.S. at 302 (emphasis added).

Third, the cases relied upon by the Eleventh Circuit that denied coverage to inland carriers did so in the context of bills of lading for *ocean* transport. Pet. App. 15a-16a; it makes no sense to exclude one mode of carrier from a clause in a bill of lading that is by its terms a "*multimodal* transport contract" with an *inland* destination. JA 85 (definition of "freight forwarder") (emphasis added); *Report to Congress* at 29 ("the U.S. marine transportation system extends beyond the waterfront, using trucks, railroads, and pipelines to receive and ship products"). The Eleventh Circuit nonetheless justified that result because the Himalaya clause extended COGSA to its beneficiaries for this transaction. Pet. App. 5a.[17] and the Eleventh Circuit felt the need to "be

[17] Petitioner and respondents certified the case to the Eleventh Circuit on the basis that Norfolk Southern's liability under both the Hamburg Sud and ICC bills, if they applied, was the COGSA limit of $500 per package, or $5,000. C.A. Pet. for Permission To Appeal Interlocutory Order at 4. Respondents did not dispute this in their brief in opposition, but in their later supplemental brief they raised for the first time a suggestion that Norfolk Southern's liability limit under the ICC bill would be $450,000. Resp. Supp. Br. 9. That issue is unnecessary to the question presented of whether the Himalaya Clause applies to Norfolk Southern (at whatever limit), and is presented too late. Sup. Ct. R. 15.2. It is also a misconstruction of the phrase "COGSA, where applicable" in ¶ 8.6(a) of the FBL, which covers the circumstance where the actual ocean carrier extends COGSA by contract to inland transportation. JA 92-93; *see* 1 Sorkin, *supra* § 2.01[3], at 2-15 ("When [COGSA] does not apply of its own force (ex proprio vigore), it may nevertheless be applicable as a contract."). In any event, respondents should not be able to dispute the applicability of the COGSA limit, when that was the basis on which they secured a favorable ruling from the Eleventh Circuit. Finally, to the extent respondents may claim a limitation of liability in the ICC bill that is much higher than the Hamburg Süd limitation, that merely underscores the need for this Court to resolve this case on the basis of the first question presented.

cautious about extending the reach of a Himalaya clause, and with it the reach of COGSA, inland," *id.* at 16a. This bespeaks confusion. The FBL is a standard-form document to cover transportation anywhere in the world. It provides a default liability rule; another special rule of network liability where "during one particular stage of multimodal transport" there is "an applicable international convention or mandatory national law would have provided another limit of liability"; and another rule where COGSA applies. JA 91-93 (¶¶ 8.3-8.6). The Himalaya clause cannot be read to distinguish between inland and marine stages of transport, or to create a special exception for inland carriers when the COGSA limit happens to apply. It provides without qualification that "[t]hese [liability] conditions apply *whenever claims relating to the performance of the contract* evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." JA 91-93 (¶ 10.1) (emphasis added). And inland carriers cannot be excluded from this clause (¶ 10.1) unless the freight forwarder is exonerated from liability for their acts under clause 2.2, JA 86, a construction this bill cannot bear.

Herd does not authorize courts to engage in reformation of contracts in keeping with their own wooden rules of risk allocation. The Eleventh Circuit's construction of the Himalaya clause, like its rule on the enforceability of ocean carrier bills of lading, contravenes this Court's precedent and unfairly gives cargo owners and insurers windfalls that were not part of their bargains.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

RICHARD K. HINES, V
TAYLOR TAPLEY DALY
NELSON MULLINS RILEY & SCARBOROUGH LLP
First Union Plaza, Suite 1400
999 Peachtree Street, NE
Atlanta, GA 30309
(404) 817-6000

R. BRUCE RIDER
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 629-2877

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
AMANDA L. TYLER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

HYMAN HILLENBRAND
DEORCHIS, HILLENBRAND & WIENER, LLP
2650 Biscayne Boulevard
Miami FL, 33137
(305) 571-9200

Counsel for Petitioner

March 24, 2004

* Counsel of Record

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

- «Freight Forwarder» means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- «Merchant» means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- «Consignor» means the person who concludes the multimodal transport contract with the Freight Forwarder.
- «Consignee» means the person entitled to receive the goods from the Freight Forwarder.
- «Taken in charge» means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- «Goods» means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability

Notwithstanding the heading «FIATA Multimodal Transport Bill of Lading (FBL)» these conditions shall also apply if only one mode of transport is used.

2. Issuance of this FBL

2.1. By issuance of this FBL the Freight Forwarder

a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL,

b) assumes liability as set out in these conditions.

2.2. Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3. Negotiability and title to the goods

3.1. This FBL is issued in a negotiable form unless it is marked «non negotiable». It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.

3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as «shipper's weight, load and count», «shipper-packed container» or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.

4. Dangerous Goods and Indemnity

4.1. The Merchant shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.

4.2. If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability or expense arising out of their being taken in charge, or the carriage, or of any service incidental thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.

4.3. If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.

5. Description of Goods and Merchant's Packing and Inspection

5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.

5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant.
The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.

6. Freight Forwarder's Liability

6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1.a, unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.

6.4. If the goods have not been delivered within ninety consecutive days following soon date of delivery determined in Clause 6.3. the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

6.5. When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events, specified in a - e of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:

a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge,

b) insufficiency or defective condition of the packaging or marks and/or numbers,

c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant,

d) inherent vice of the goods,

e) strike, lockout, stoppage or restraint of labour.

6.6. **Defences for carriage by sea or inland waterways**

Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,

b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8. Limitation of Freight Forwarder's Liability

8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or if there are no such prices, by reference to the normal value of goods of the same name and quality.

8.3. Subject to the provisions of subclauses 8.4. to 8.9. inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.

8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. Applicability to Actions in Tort

These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. Liability of Servants and other Persons

10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.

10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal actor omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11. Method and Route of Transportation

Without notice to the Merchant the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12. Delivery

12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.

12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.

12.3. If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:

abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.

In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13. Freight and Charges

13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.

13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, as at the option of the Freight Forwarder on the date of this FBL.

13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.

13.4. The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.

13.5. The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.

13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14. Lien

The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15. General Average

The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

16. Notice

16.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.

16.2. Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.

17. Time bar

The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.

18. Partial Invalidity

If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19. Jurisdiction and applicable law

Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

The ICC logo denotes that this document has been deemed by the ICC to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents. The ICC logo does not imply ICC endorsement of the document nor does it in any way make the ICC party to any possible legal action resulting from the use of this document.

BEST AVAILABLE COPY